the allegation. Then, on November 13, through her new solicitors, the applicant filed an Originating Summons asking for custody of the two children, an injunction against the respondent and for maintenance. On the same day, the applicant also applied *ex parte* for interim custody of the two children and an injunction against the respondent from removing the children from her custody without her consent until further order. This *ex parte* application was heard, and an order was granted on November 19, 1982. On January 5, 1983, the wife applied to commit the husband for breach of the Order of November 19, 1982. At the same time, the respondent applied to set aside this Order.

Applying the principles of *Ansah's case* to the facts herein mentioned, I am of the view that there is no "emergency created when the interest of justice or the protection of the child clearly demands the immediate intervention by the court". The main ground that could have possibly influenced the Court to grant the interim custody appears in paragraph 5 of applicant's affidavit dated November 13 1982, where it is alleged that the respondent had tricked the applicant by asking for the child to be with him for one night. However, notwithstanding this allegation, in my opinion, this is not a ground for an *ex parte* application.

On the question of urgency, I find as a fact from the sequence of events from September 28, 1982 until the application was filed on November 13, 1982 that there was no urgency in the matter to demand immediate intervention by the Court.

Again, from the correspondences and negotiation between solicitors, prior notice of the intended application could easily be given and thus could have avoided this application to be made *ex parte.*

From the facts and circumstances surrounding this case, the applicant ought to have filed the application *inter partes* so that the respondent could have been given the opportunity of being heard on the disputed issue.

I allow this application by setting aside the Order of November 19, 1982.

Costs will be costs in the cause.

Application allowed.

Solicitors: *Wan Abdul Majid C.H. Liew & Sulaiman Alias; Skrine & Co.*

SEK KON KIM v. ATTORNEY-GENERAL

[O.Cr.J. (Mohamed Dzaiddin J.) March 23, 1983]

[Kuala Lumpur – Federal Territory Criminal Application No. 3 of 1983]

Criminal Law & Procedure – Bail – Extradition proceedings against applicant for alleged criminal breach of trust in Australia – Court's unfettered discretion to grant bail – Extradition Ordinance 1958 – Fugitive Criminals Act 1967, s. 23 – Criminal Procedure Code, s. 388(i)

Extradition – Extradition proceedings for alleged criminal breach of trust in Australia – Extradition Ordinance 1958 – Fugitive Criminals Act 1967, s. 23.

Bail – Extradition proceedings against applicant for alleged criminal breach of trust in Australia – Court's unfettered discretion to grant bail – Factors considered by court – Extradition Ordinance 1958 – Fugitive Criminals Act 1967, s. 23 – Criminal Procedure Code, s. 388(i).

The applicant, a Malaysia, was a practising barrister and solicitor in Australia until late October 1982 when he returned to Malaysia without winding up his affairs in his legal practice. In December 1979 the Australian authorities started extradition proceedings against him for alleged criminal breach of trust. He was alleged to have committed offences in Australia which related to fraudulent conversion of cheques totalling A$104,646.78. On March 17, 1983 he was arrested on a warrant of apprehension issued by a Magistrate pursuant to an order signed by the Minister of Home Affairs, Malaysia under section 2 of the Extradition Ordinance 1958. The applicant was produced the same afternoon before a Magistrate who fixed the hearing of the extradition proceedings on April 7, 1983. In the meantime, he was remanded in custody. Counsel for the applicant applied for his release on bail pending the hearing on April 7, 1983. The application was refused by the learned Magistrate. The applicant applied to the present court to grant bail.

Held, allowing the application: (1) in so far as the Extradition Ordinance is concerned, the court has unfettered discretion to grant bail under section 388(i) of the Criminal Procedure Code;

(2) having considered the nature and gravity of the offence, the character, means and standing of the applicant, the guarantee given by his counsel that, if need be, he would surrender himself to the Australian Authorities to face the charges, and having weighed the other considerations for and against this application, bail of $100,000 with 2 sureties would be granted. The applicant must also surrender all his travelling documents including his international passport to the court.

CRIMINAL APPLICATION.

Lee Lim Huat for the applicant.

John O'Hara (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Mohamed Dzaiddin J.: The applicant, a Malaysian, was a practising barrister and solicitor in Victoria, Australia, until late October 1982 when he returned to Malaysia without winding up his affairs in his legal practice. In 1979, the Australian authorities commenced investigation into certain offences allegedly committed by him in the State of Victoria; and through the assistance of Interpol, he was located in Kuala Lumpur. They then started extradition proceedings in December 1979. These proceedings were based on information for offences he was alleged to have committed in Australia which related to fraudulent conversion of cheques totalling A$104,646.78. Counsel informed me they are equivalent to an offence of C.B.T. under our Penal Code.

On March 17, 1983, the applicant was arrested by the Malaysian Police outside Court No. 8 Jalan Duta courts on a warrant of apprehension issued by a Magistrate pursuant to an order signed by the Minister of Home Affairs Malaysia under Section 8 of the Extradition Ordinance 1958. The applicant was produced on the same afternoon before the Magistrate at Court No. 6 who fixed the hearing of the extradition proceedings on April 7, 1983. In the meantime, he was remanded in custody. Counsel for the applicant applied for his release on bail pending the hearing on April 7, 1983. This application was however refused by the learned Magistrate on the ground, as deposed by the counsel for the applicant in his supporting affidavit, "that being a fugitive criminal under the Extradition Ordinance 1958, the applicant ought to be remanded in custody."

Counsel has urged me to consider the circumstances and the grounds as deposed in his affidavit and after considering them, I should exercise my discretion to grant bail. Obviously, Mr. John O'Hara, the Senior Federal Counsel, on behalf of the Attorney General, opposed bail.

Unlike the Fugitive Criminals Act 1967 which gives the court power to grant bail to a fugitive criminal, the Extradition Ordinance 1958 does not provide such a power. Section 23 of the 1967 Act says that the provisions of the appropriate Criminal Procedure Code relating to bail shall apply in the same manner as they would apply if such person was accused of committing in Malaysia the offence of which he is accused or has been convicted. In so far as the Extradition Ordinance is concerned, my view is that the court has unfettered discretion to grant bail under Section 388(i) of the Criminal Procedure Code. The main provision of this section states that when any person accused of any non-bailable offence is arrested or detained, he may be released on bail by the OCPD or the court, but shall not be so released if there are reasonable grounds for believing that he has been guilty of an offence punishable with death or life imprisonment. Clearly, the nature of offences allegedly to have been committed by the applicant are equivalent to our local offence of criminal breach of trust, which is a non-bailable offence. Section 3 of the Code provides that all offences under any written law shall be inquired into and tried according to the provisions contained in the Criminal Procedure Code, subject to any written law for the time being in force regulating the manner or place of enquiring into or trying such offences. And Section 2 defines "offence" as any act or omission made punishable by any law for the time being in force. The term "extradition crime" is defined in the Extradition Ordinance to mean "a crime which if committed in the Federation would be punishable under the law of the Federation and would be one of the crimes described in the First Schedule to this Ordinance" (one of which is criminal breach of trust).

The main grounds of his application are that the offences alleged are not serious in nature, that the applicant was merely accused of committing these offences and is therefore not a convicted person; that the offences were alleged to have taken place in 1973 by which time the applicant had returned to Malaysia and continued to do business in property development in this country. He has other vast business dealings. It is further submitted by his counsel, the applicant was willing to surrender his travelling documents to the authorities. What he required from now until April 7, 1983 was time to wind up his affairs. He was prepared to surrender himself to the Australian Authorities and even make a trip to Australia at his own expense to face the charges.

On the other hand, the learned Deputy Public Prosecutor in raising the objection has urged me to consider that there could not be any guarantee that the applicant would turn up at the Magistrate's Court Jalan Duta on April 7, 1983 even if he has offered to surrender his travelling document and furnish sufficient security for bail. It is also submitted that since his return to Malaysia in late October 1973 the applicant has not gone back to Victoria to wind up his affairs there. There

is also an obligation on the part of the Malaysian Government based on the order made by the Minister of Home Affairs to ensure that the hearing would go on April 7, 1983.

There are a number of matters which I should consider in granting or refusing bail in the exercise of my discretion. Some of these matters are:-

(1) The nature and gravity of the offence charged.

(2) The severity and degree of punishment which conviction might entail.

(3) The guarantee that the accused person if released on bail would not either abscond or obstruct the prosecution in any way.

(4) The danger of the witness being tampered with and whether the accused person if released on bail is likely to tamper with prosecution evidence.

(5) The opportunity of the accused to prepare the defence.

(6) The character, means and standing of the accused.

(7) The long period of detention of the accused and probability of further period of delay.

In fact, these matters do not appear to be exhaustive and there may be other points which a trial judge should consider depending on the circumstances of each case.

In my view, the main objection of the respondent that there cannot be any guarantee that the applicant would turn up at the Jalan Duta Court on April 7, 1983 based on his previous act in not returning to Australia since October 1973 and also the consideration of governmental intervention being involved do not outweigh the considerations for the applicant. Having given my consideration to the nature and gravity of the offence, the character, means and standing of the applicant, the guarantee given by his counsel that, if need be, he would surrender himself to the Australian Authorities to face the charges, and having weighed the other considerations for and against this application, it is my judgment that this application for bail be allowed, on the following conditions. Bail of $100,000/- with two sureties who are acceptable to the Sr. Asst. Registrar and the applicant shall surrender all his travelling documents including his international passport to the court.

Application allowed.

Solicitors: *Yusuf Gulam Lee & Co.*

C. SIVANATHAN v. ABDULLAH BIN DATO' HAJI ABDUL RAHMAN

[A.C.J. (Chan J.) June 22, 1983]
[Johore Bahru – Civil Appeal No. 12 of 1979]

Defamation – Slander Action for damages – Meaning of "slander which imputes a criminal offence" – Words spoken "dishonest, cheat, liar" – Whether actionable without proof of special damage – Whether imputing crime of "cheating".

The plaintiff, a member of the Tasek Utara Golf Club in Johore Bahru had an altercation with the defendant, the executive secretary of the said club, over the playing rights of the plaintiff's son who was a junior member of the club. The altercation ended with the defendant calling the plaintiff "dishonest, cheat, liar" in the presence of the plaintiff's son and another member of the club. The plaintiff sued the defendant in the Sessions Court for damages for slander. The President of the Sessions Court found in favour of the plaintiff and awarded him damages in the sum of $1,000.00. The defendant appealed to the High Court.

Held: the words "dishonest, cheat, liar" taken in the context in which they were said could not possibly impute any crime – let alone a crime punishable by imprisonment. The words were therefore not actionable without proof of special damage. Since the words were not capable of imputing the crime of cheating, and no special damage was proved, the plaintiff's action must fail. Moreover, the words were uttered in anger and understood in their context as not imputing a crime but as mere general abuse.

Per Curiam: the true legal position is that spoken words which impute a crime that is punishable corporally – that is to say: by imprisonment, whipping or hanging – are actionable without proof of special damage.

[*Editorial Note:* The plaintiff appealed to the Federal Court (Lee Hun Hoe, C.J. (Borneo) Hashim Yeop A. Sani and Syed Agil Barakbah F.JJ.) which held on September 27, 1983, "the Sessions Court President was wrong and the High Court judge was right." The plaintiff's appeal was accordingly dismissed with costs.]

Cases referred to:

(1) *Webb* v. *Beavan* (1883) 11 Q.B.D. 609.
(2) *Hellwig* v. *Mitchell* [1910] 1 K.B. 609, 612.
(3) *Michael* v. *Spiers & Pond Ltd.* (1909) 101 L.T. 352.
(4) *Ormiston* v. *Great Western Railway Co.* [1917] 1 K.B. 598.
(5) *Gray* v. *Jones* [1939] 1 All E.R. 798, 802.
(6) *D. & L. Caterers Ltd.* v. *D'Ajou* [1945] 1 K.B. 210, 213.
(7) *Australian Newspaper* v. *Bennett* [1894] A.C. 284.
(8) *Nevill* v. *Fine Art Co.* [1897] A.C. 68.
(9) *English and Scottish Co-op. Ltd.* v. *Odhams Press Ltd.* [1940] 1 K.B. 440, 452.